ved with it. The purpose of the new order, generally speaking, was to restrict the applicant's freedom of movement after his release. He was not to leave a particular district in Kelantan without the permission of the police. But about a year after his release he left the district without police permission and was arrested. He was charged as above stated.

The arguments at the hearing before us were mainly directed to the question whether in the circumstances of this case the detaining authority was acting within its powers in making the restriction order under paragraph (b) of section 8(1). On behalf of the applicant it was argued that in terms of section 8(1) the detaining authority has power to act under either paragraph (a) or (b) but not under both. The word "or" was relied upon as having that effect. Syed Othman J. in *Public Prosecutor* v. *Musa, supra,* agreed that the power is alternative. In any case he said it would be pointless for the detaining authority to act under (a) and (b) at the same time. He added, however, that there is nothing to prevent the detaining authority from acting under paragraph (b) on the expiry of the order under (a) on a fresh satisfaction. He did not say in so many words what he meant by "fresh satisfaction". He thought there might be a change of circumstances or situation relating to the applicant but did not elaborate. At any rate he was of the view that the applicant was challenging the satisfaction of the Yang di-Pertuan Agong. With respect I think in challenging the validity of the impugned order the applicant was doing no more than what he was entitled to do in a criminal cases. His reason was that while under detention he could not have done anything to warrant the issue of another order under section 8(1). He could not possibly have acted in any manner prejudicial to the security of Malaysia to render it again necessary to make a fresh order. On the evidence in this case it is difficult to conceive the existence of any new or fresh ground or fresh allegations of facts to support a fresh order. In this connection, however, Ibrahim J. had this to say —

"... I need only add that I cannot see why if another detention order for a further period of two years could have lawfully been made a restriction order could not instead be lawfully made on the expiry of D6 upon the Yang Di-Pertuan Agong being satisfied afresh that it was necessary to make such an order, even though it might have been based on the same ground and allegations of facts for it cannot be said that the Yang Di-Pertuan Agong was precluded from also taking into consideration the circumstances then prevailing, *i.e.* the improved security position of the country when he became so satisfied."

In other words, if there is power under the new subsection (1A) to extend the period of detention there is no reason why the detaining authority cannot act under paragraph (a) and again after an interval of time under paragraph (b). The truth is that the addition of the new subsection (1A) does not and cannot affect the construction of the original subsection (1). The original subsection expressly limits the power to detain or impose restriction to a period of not exceeding two years. The new subsection only gives power to extend such period and nothing more. To read into the original subsection something which is not there is against the ordinary canon of construction. Quite apart from what I have just stated I am of the view that the provisions of the Internal Security Act, 1960 so far as they are inconsistent with the provisions of the Constitution must be strictly construed. The Act is a special legislation made under Article 149 of the Constitution which declares the inconsistent provisions valid. By strict construction I mean that if in construing those provisions there is any doubt as to the power of the detaining authority, as in this case, that doubt must be resolved in favour of the subject. In this case I do not think I need rely on this principle of construction because reading section 8(1) as I do I have no doubt that in the circumstances of this case there is no power to act under paragraphs (a) *and* (b) against the applicant. The words of limitation "not exceeding two years" and the word "or", as already stated, make it clear that the detaining authority cannot act on the same grounds and on same allegations of fact twice against the same person. I would agree with Syed Othman J. if the fresh order referred to in his judgment was based on fresh grounds and fresh allegations of fact. But there was no evidence of that. Accordingly, I would answer the second question in the negative.

If my view is correct, then it is only fair and just that the applicant's conviction should be quashed and that fine, if paid, should be refunded to him. There is power to do that under subsection (5) of section 66 of the Courts of Judicature Act, 1964.

Order accordingly.

Solicitors: *Rithauddeen & Aziz.*

LETCHUMANAN v. KOK SENG FATT

[F.C. (Azmi L.P., Suffian and Ali F.JJ.) January 24, 1973]

[Kuala Lumpur — Federal Court Civil Appeal No. 65 of 1972]

Moneylenders — Firm registered as moneylender — Whether partner can sue in name of firm — Objection not taken on pleadings or in court below — Fresh loan renewing earlier loans — Failure to sign as lender in first loan — Contract unenforceable — Subsequent renewal enforceable — Moneylenders Ordinance, 1951, s. 16.

Practice and Procedure — Appeal — Question of mixed law and fact — Point not raised in court below — Appellate court's refusal to hear argument.

This was an appeal against the decision of the trial judge who gave judgment in favour of the respondents in a claim on a moneylending debt. On appeal it was argued:—

(1) the respondent was not the lender and was not entitled to bring the action as the respondent and others were partners in a firm which was licensed as moneylenders;

(2) the learned trial judge was wrong in holding that the moneylenders complied with the provisions of the Moneylenders Ordinance. The loan in this case was a renewal of earlier loans, and it appeared that the respondent had not signed the first loan as a lender and had collected excessive interest.

Held: (1) the objections as to the status of the respondent were not raised on the pleadings or in the court below and therefore this ground of appeal cannot be considered and must be dismissed;

(2) the present claim was not based on the documents relating to the first loan and even if that loan was unenforceable, this did not render any of the subsequent renewals of the loan also unenforceable.

Cases referred to:-

(1) *Vorst* v. *Goldstein* [1924] 2 K.B. 372.

(2) *Whiteman* v. *Sadler* [1910] A.C. 514.

(3) *Mertz* v. *South Wales Equitable Money Society Ltd.* [1927] 2 K.B. 366.

(4) *Chan Sau Yin* v. *Kok Sen Fatt* [1966] 2 M.L.J. 54.

H. B. Ball (*Thara Singh Sidhu* with him) for the appellant.

Heng Cheng Swee (*Lawrence Tan Hui Seng* with him) for the respondent.

Azmi L.P.: The plaintiff calling himself "Kok Sen Fatt trading as Yoong Shing Finance Co.", brings this suit against the defendant for the repayment of a loan he gave to the defendant on 31st October 1968 and interest accruing thereon. The plaintiff also said he is a licensed moneylender and that a memorandum under section 16 of the Moneylenders Ordinance 1951 was signed by the defendant.

In paragraph (7) of his statement of claim he sets out the particulars of his claim as follows:—

(a) The principal sum of $41,000.

(b) $1,640 interest due from 1st January 1969 to 19th March 1969 (inclusive).

(c) Interest at 18% per annum on the said defaulted sums of $41,000 principal and $1,640 interest due from 20th March 1969 till date of realisation under paragraph 5 herein.

(d) Further interest at 6% per annum on the judgment debt in respect of interest accruing up to 20th August 1969 totalling $3,198 from date of judgment to the date of full realisation thereof.

The plaintiff also attached to the statement of claim, a statement of account.

The defendant admitted in his statement of defence that the plaintiff's firm was a licensed moneylender, but denied that the firm lent him or that he borrowed from the firm $41,000 on 31st October 1968 as alleged. He contended that (1) the alleged memorandum was not a proper contract for loan as required by section 16 of the Moneylenders Ordinance and that (2) it did not set out the true nature of the money lending transaction therein, nor did it contain all the terms of the loan. In denying the various allegations made by the plaintiff in his statement of claim the defendant sets out the following as the true facts of the case:—

(a) on 7th July 1961 the defendant borrowed $20,000 bearing interest at 1.20 per hundred.

(b) on 20th July 1963 on plaintiff's suggestion the loan was renewed to include unpaid interest and a small sum advanced to the defendant making the loan as $29,000, and a fresh memorandum of loan was executed showing the interest as $412.50 per month.

(c) the defendant paid interest in cash and cheques amounting to $4,600.

(d) on 20th November 1965, at plaintiff's firm's suggestion the defendant renewed the loan for the sum of $35,000 made up of $27,500 principal and interest of $7,500. The interest agreed to be paid was $450 per month.

(e) Further interest was paid at various dates amounting to $9,900.

(f) On or about 30th October 1968, the loan was again renewed for a sum to include unpaid interest and a fresh memorandum was executed for $41,000 made up of $35,000 as principal and $6,000 as unpaid interest.

It would appear from the evidence that the loan of $41,000 the subject matter of the present claim is the last of a series of four loans taken by the defendant from the plaintiff namely as follows:—

First Loan — For $20,000 carrying interest at 12% p.a. on a promissory note Ex. D. 5A executed on 7th July 1961 — Memorandum under section 16 Ex. D. 5B.

Second Loan — For $29,000 interest at 18% p.a. on a promissory note Ex. D. 6A executed on 20th July 1963 — Memorandum under section 16 — Ex. D. 6B.

Third Loan,— For $35,000 interest at 18% p.a. on a promissory note D. 7A executed on 20th November 1965 — Memorandum under section 16 — Ex. D. 7B.

Fourth Loan — For $41,000 interest at 18% on a promissory note Ex. P. 2 executed on 31st October 1968 — Memorandum under section 16 Ex. P. 1.

It was also not disputed that the money borrowed in the second, third and fourth loans was intended to be used for the extinction of the immediately earlier loan. That is to say the money from the second loan was to extinguish the first and the third to extinguish the second and so on and in each case the amount of loan stated in the document consisted of the previous loan and the interest due on it.

The learned trial judge gave judgment in favour of the plaintiff. Before him it was argued that the learned judge should review all the three previous loans. On the first loan of $20,000 for example, the plaintiff charged 18% interest whereas according to the documents it was only to be 12%. It was also pointed out that the plaintiff failed to countersign both the promissory notes and the memorandum under section 16. It was also contended that the plaintiff had failed to keep a proper account of all the transactions.

The learned judge rejected all these arguments in the following words:

"In my view what happened during the three previous loans are irrelevant as they have been extinguished. In any event from the evidence it could not be said that the account books of the plaintiff have not been regularly kept."

Before us the judgment of the learned trial judge was attacked on the following grounds:—

First, it was argued that the plaintiff has no right to bring this action because he was not the lender and the learned judge should have held that a firm of partnership known as "Yoong Shing Finance Co." consisting of the plaintiff and others as partners were the lenders as evidenced by the memorandum Exh. D. 7B dated 20th November 1965 and the memorandum Exh. P. 1 dated 31st October 1968. In Exhibits D. 7B and P. 1. the lender's name is given as "Kok Sen Fatt and others trading as Yoong Shing Finance Co." but in the writ and the statement of claim the plaintiff is referred to as only "Kok Sen Fatt trading as Yoong Shing Finance Co." The use of these different names would therefore, according to counsel for the appellant be contrary to the provisions of section 8(b) of the

Moneylenders Ordinance and in support cited three English cases namely: *Vorst* v. *Goldstein,*[1] *Whiteman* v.*Sadler*[2] *and Mertz* v. *South Wales Equitable Money Society Ltd.*[3]

Section 8(b) of the Moneylenders Ordinance provides that if any person carries on business as a moneylender in any name other than his authorised name, he commits an offence. On the face of these documents, it would appear that by the use of the different names the provisions of this section have been violated. Unfortunately, however, for the appellant these objections were not taken on the pleadings. The defendant himself in his statement of defence merely said this:—

"As to paragraph (1) the defendant admits that the plaintiff's firm is a licensed moneylender",

and plaintiff's paragraph (1) says this:—

"The plaintiff is a licensed moneylender carrying on business at No. 357 Jalan Pudu, Kuala Lumpur".

For the plaintiff section 5(3) was read to us and it reads as follows:—

"(3) A licence taken by a person as a partner in a firm shall be deemed to be a licence to the firm, and every other partner actively conducting in the State the moneylending business of such firm shall be subject to the provisions of this Ordinance in like manner as if he had himself taken out the licence and shall be deemed to hold the licence."

It is obvious that in this case Yoong Shing Finance Co. is a firm and if that firm had been registered as a moneylender then the plaintiff Kok Sen Fatt and any of the other partners are deemed also to hold a licence. Apparently this question was raised in a previous case in which from its description the same firm was concerned, namely *Chan Sau Yin* v. *Kok Sen Fatt,*[4] and briefly stated Thomson L.P. in that case pointed out that there was nothing wrong in Kok Sen Fatt suing on behalf of the firm of Yoong Shing Finance Co. In that case, however, the licence and the entries in the Register of Businesses were before the court and the court had the means of studying them. We have not had the same opportunity in this court for the simple reason that this matter was not argued in the court below. In my view this is an example of a case where this court should not hear argument on a point not raised below because it is actually a question of mixed law and fact. For this reason, in my view this ground of appeal should be dismissed.

The next ground reads as follows:

"The learned trial judge erred in law and in fact in holding that the said memorandum dated 31st October 1968 Exh. P.1 has complied with the provisions of section 16 of the Moneylenders Ordinance 1951 and in giving judgment for the plaintiff."

Section 16 among other things requires that "the parties to the contract or their respective agents" sign the memorandum and the failure to do so would make the contract or security unenforceable. It also requires that the note or memorandum shall contain all the terms of the contract and in particular show separately and distinctly the principal and the rate of interest. The rate of interest in Exh. D. 5B is shown as 12% per annum but as the plaintiff himself admitted he subsequently charged 18%. His explanation was that subsequent to the execution of the document the defendant withdrew certain security namely the registration card of his two bull dozers. It was therefore said that having wrongly overcharged the interest on this loan all subsequent loans which were renewals of the first loan were therefore tainted with illegality. In my own view the failure of the plaintiff to sign as a lender on the first loan has merely rendered that memorandum unenforceable, which merely means that if the plaintiff had sued on that document his suit would be dismissed but the contract itself was not illegal. The difference between an illegal contract and an unenforceable contract is a difference of substance and procedure. It would therefore not necessarily follow as was suggested that any of the subsequent renewals would have thereby become also unenforceable.

In reference to the alleged overcharge of interest on the first loan, I do not think that this made the contract illegal. Apart from that, the present claim was not based on the documents made in reference to that loan. I am therefore inclined to agree with the trial judge's view that in the circumstances of the case that matter is irrelevant to the present claim. I would therefore dismiss the appeal with costs.

Suffian and **Ali F.JJ.** concurred.

Appeal dismissed.

Solicitors: *Sault, Thara & Co.; Heng Cheng Swee & Co.*

NAVARADNAM v. SUPPIAH CHETTIAR

[F.C. (Ong C.J., Gill and Ong Hock Sim F.JJ.)

January 29, 1973]

[Ipoh — Federal Court Civil Appeal No. 57 of 1972]

Stamps — Promissory note stamped after execution — Whether duly stamped — Stamp Ordinance, 1949, ss. 41 and 47.

In this case the respondent had brought an action on three promissory notes. It appeared that these promissory notes had been stamped, after they were signed by the debtor. On objection being taken, the President of the Sessions Court held that the promissory notes were not admissible in evidence as they were not "duly stamped" and he dismissed the matter. The respondent thereupon appealed to the High Court and Sharma J. allowed the appeal holding that the promissory notes could be stamped "before or at the time of execution", so as to cover a reasonable period of time after execution ([1972] 2 M.L.J. 60). The appellant appealed to the Federal Court.

Held: *Per* Ong C.J. and Ong Hock Sim F.J. (Gill F.J. dissenting) the provisions of section 41 of the Stamp Ordinance, 1949 must be strictly construed and as the promissory notes in this case were only stamped after they were executed, they were not duly stamped and were inadmissible in evidence.

Cases referred to:

(1) *Re* v. *Debtor* [1958] 2 All E.R. 533, 536.

(2) *Surij Mull* v. *Hudson* (1901) I.L.R. 24 Mad. 259.

(3) *Rohini Chandrakant Vijayakar* v. *A.I. Fernandez* A.I.R. 1956 Bom. 421.

(4) *M. Takim & Co.* v. *Fazel Kassim Velji* [1955] A.C. 617 at p. 626.

(5) *Queen* v. *Arkwright* (1849) 18 L.J.Q.B. 26 at p. 28.

(6) *Chop Tiong Kok Hang* v. *Hock Cheong & Co.* [1934] M.L.J. 74 at p. 76.